

**United States Department of Labor
Employees' Compensation Appeals Board**

O.M., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
St. Paul, MN, Employer**

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**Docket No. 16-0747
Issued: July 7, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 7, 2016 appellant filed a timely appeal from a February 9, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated March 20, 2015, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 29, 2015 appellant, then a 65-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on December 31, 2014 she sustained a right knee and lower extremity injury while walking and sweeping steps. She stopped work on January 13, 2015.

In a February 4, 2015 letter, the employing establishment controverted the claim, asserting that appellant did not report the injury or file a claim until January 29, 2015, nearly a month after the date of the injury. Also, appellant continued working full duty until January 13, 2015 and the employing establishment could not determine the date appellant first received medical treatment.

In an undated attending physician's report (Form CA-20) date stamped as received by the employing establishment on January 27, 2015, Dr. Gary S. Lewis, an attending Board-certified family practitioner, diagnosed internal derangement of the right knee with a lateral meniscal tear. He opined that appellant sustained the injury at work on December 30, 2014 when she "twisted knee by going down stairs at work."

Appellant provided a "USPS/Alignetworks" referral form to Dr. Lewis. The form notes a December 30, 2014 knee injury. The employing establishment date stamped the form as received on January 30, 2015.

In a February 13, 2015 letter, OWCP advised appellant to submit factual evidence corroborating the claimed incident, and medical evidence diagnosing a right foot injury caused by that incident. It afforded her 30 days to submit such evidence.

Appellant provided February 19, 2015 work restrictions from Dr. Lewis, and a physical therapy prescription. In a February 24, 2015 note, Dr. Lewis cleared appellant to return to restricted duty on February 27, 2015.

By decision dated March 20, 2015, OWCP denied the claim as fact of injury had not been established. It found that the factual record did not support that the December 31, 2014 incident occurred at the time, place, and in the manner alleged. OWCP mailed the decision to appellant at her address of record.

In a letter dated December 21, 2015, postmarked December 28, 2015, and received on January 5, 2016 appellant requested reconsideration. She contended that she had not received the March 20, 2015 decision. Appellant submitted a January 16, 2015 employing establishment letter authorizing emergency medical treatment by Dr. Lewis. The employing establishment noted that, due to the exigency of the visit, it had not yet completed a Form CA-16 authorization for medical treatment. Appellant also provided a January 17, 2015 employing establishment accident report, and physical therapy notes dated from February 13 to May 14, 2015.

By decision dated February 9, 2016, OWCP denied reconsideration, finding that appellant's letter and accompanying documents did not constitute new, relevant evidence. It found that the physical therapy notes were irrelevant to the fact of injury issue.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.³ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁴

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁵ He or she need only submit relevant, pertinent evidence not previously considered by OWCP.⁶ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁷

ANALYSIS

Appellant claimed that she sustained a right knee injury in the performance of duty on December 31, 2014. OWCP denied the claim by decision dated March 20, 2015, finding that fact of injury had not been established. Appellant requested reconsideration by letter dated December 21, 2015, postmarked December 28, 2015, and received January 5, 2016. She provided a January 16, 2015 employing establishment authorization for emergency medical treatment by Dr. Lewis, an attending Board-certified family practitioner, and a January 17, 2015 employing establishment incident report. Appellant also submitted a series of physical therapy notes. OWCP denied reconsideration by decision dated February 9, 2016, finding that the letter and accompanying documents did not constitute new, relevant evidence, and the physical therapy notes were irrelevant to the fact of injury issue.

The Board finds, however, that OWCP improperly denied reconsideration, as the January 17, 2016 employing establishment accident report constituted new evidence directly relevant to the fact of injury issue. The employing establishment controverted the claim, contending that appellant did not report an injury until January 29, 2015, and that it could not determine when appellant first received medical treatment. The case will be remanded to OWCP for reconsideration of the merits of the claim, including all evidence appellant submitted

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁵ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁶ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁷ *Annette Louise*, 54 ECAB 783 (2003).

accompanying her request for reconsideration. Following this and any other development deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded to OWCP for additional development consistent with this decision and order.

Issued: July 7, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board